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SIX4THREE, LLC, a Delaware
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIX4THREE, LLC, a Delaware limited
liability company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation,

MEDIA TEMPLE INC., a Delaware
corporation,

Defendants.

Case No. 3:16-cv-06716 JCS

PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER;
MEMORANDUM IN SUPPORT OF
MOTION

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT at a time and place determined by the Court, Plaintiff will and hereby does move for a temporary restraining order pursuant to Fed. R. Civ. P. 65.

Plaintiff seeks a temporary restraining order enjoining Defendants Facebook, Inc. (“Facebook”) and Media Temple Inc. (“Media Temple”), their officers, agents, servants, employees, contractors, attorneys, and all those in active concert or in participation with Defendants, including any third parties Defendants may contact to assist them in this matter, from suspending, removing or altering in any way the gripe site FacebooksAppEconomy.com (the “Site”). This motion is made on the ground that immediate and irreparable injury will result to Plaintiff and the public unless a temporary restraining order is issued.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

This is a civil action for declaratory and injunctive relief to vindicate the rights of 643 in connection with a gripe site maintained at FacebooksAppEconomy.com (the “Site”). FacebooksAppEconomy.com serves as an information resource for software developers, and in particular small businesses (“Developers”), that have been impacted by Facebook's unfair and deceptive practices. Small businesses that have been impacted can use the website to sign up for updates that follow the course of ongoing litigation and learn how they may protect their rights. See Plaintiff’s First Amended Complaint for Declaratory Judgment and Injunctive Relief, ¶1 (“First Amended Complaint”).

The Site also serves as a forum for increased public awareness of the harm caused by a lack of regulation in application economies. This is an issue of great importance to the public, the legal system and the global economy. Today, some of the largest economies in the world have

1 their rules made and monitored by companies who also get to play in the game. This aligns
2 incentives naturally toward anti-competitive behavior that detrimentally impacts both small
3 businesses and consumers. See Declaration of Theodore Kramer in Support of Motion for
4 Temporary Restraining Order, ¶12 (“Kramer Declaration”); First Amended Complaint, ¶1.

5 Facebook's application economy in particular has experienced a series of anti-competitive
6 transfers of wealth. The Site focuses on a major one that impacted thousands of businesses,
7 people and families: the closing of the Open Graph announced on April 30, 2014 in which
8 Facebook gave itself a monopoly on building applications spanning numerous industries after
9 promising for years that Developers could build the same applications and compete on neutral
10 terms. See First Amended Complaint, ¶1.

12 The Site offers a proposal for regulating Facebook's \$227 billion economy in order to
13 prevent events like this from happening again. The Site's proposal seeks to establish a basic set
14 of rights and obligations for everyone participating in Facebook's application economy with the
15 goal of minimizing perverse incentives towards anti-competitive behavior, which harms the
16 public interest and threatens the long-term viability of the economy itself. In doing so, the Site
17 seeks to engage the public and legal community not only to support the proposal but also to
18 participate in its evolution. See First Amended Complaint, ¶1.

20 643 is an image recognition software startup that built an application integrated with
21 Facebook's operating system, known as Facebook Platform. Like many Developers, 643
22 invested substantial sums of time, money and resources in building an application on Facebook
23 Platform. In doing so, 643 reasonably relied upon years of explicit promises from Facebook
24 regarding its commitment to neutrality, fairness and competition on Facebook Platform. On April
25 30, 2014, Facebook broke the promises it had made to Developers for many years and closed off
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1 their access to many types of applications that they had already made substantial investments in
2 building and maintaining. Many companies were affected by this “bait and switch” tactic, and as
3 noted by *The Wall Street Journal*, a substantial number of these companies were forced to shut
4 down.¹ See First Amended Complaint, ¶2.

5 In April 2015, 643 filed a complaint in the Superior Court of California, County of San
6 Mateo (“Ongoing Litigation”). In June 2016, the Court denied Facebook’s demurrer as to four
7 causes of action promulgated by 643, including a cause of action under California’s Unfair
8 Competition Law (UCL) and scheduled the matter for trial in Spring 2017. See Kramer
9 Declaration, ¶8. 643 proposed that Facebook implement a series of policy changes as part of a
10 proposal to promote fairness and competition in Facebook’s application economy. Facebook
11 refused to discuss these measures with 643. In an effort to raise awareness of this important issue
12 of anti-competitive behavior in application ecosystems, 643 notified Facebook of the Site,
13 including its intention to engage the developer community around this issue to garner support for
14 its proposal. See First Amended Complaint, ¶3.

15
16 On 11 November 2016, Facebook sent a Notice of Trademark Infringement to 643,
17 attached to the First Amended Complaint and Kramer Declaration as Exhibit A. In its Notice,
18 Facebook claims that 643’s registration and use of the Site violates the Lanham Act (15 U.S.C. §
19 1051 *et seq.*) and infringes and dilutes the famous Facebook trademark. The Notice requests that
20 643 remove the Site and let its domain registration lapse or Facebook “will have no choice but to
21 pursue all available remedies against [643]”. See First Amended Complaint and Kramer
22 Declaration, Exhibit A.
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26 ¹ See: “Facebook’s Restrictions on User Data Cast a Long Shadow,” *The Wall Street Journal*, at
27 <http://www.wsj.com/articles/facebooks-restrictions-on-user-data-cast-a-long-shadow-1442881332>
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1 On 20 December 2016, Media Temple, the hosting provider for the Site,
2 sent notice that it would suspend the site within 24 hours based on a formal complaint submitted
3 by Facebook. See First Amended Complaint and Kramer Declaration, Exhibit B.

4 643 therefore brings this declaratory relief action to clarify the rights of the parties, and to
5 refute the baseless assertions of trademark infringement and trademark dilution finally and
6 definitively, and to seek a temporary restraining order and preliminary and permanent injunction
7 against any suspension or removal of the Site or its related domains. Plaintiff seeks a declaratory
8 judgment holding that the Site does not infringe any trademarks held by Defendant Facebook and
9 is protected by the Fair Use Doctrine, California's Anti-SLAPP Law (Cal. Civ. Proc. Code §
10 425.16), and the First Amendment of the United States Constitution. 643 also seeks temporary,
11 preliminary and permanent injunctive relief enjoining Defendant Facebook from any efforts to
12 enforce any trademark in the Facebook trademark against 643 and the Site, including through the
13 use of DMCA takedown notices, WIPO arbitration, or otherwise, and including a preliminary
14 injunction and temporary restraining order prohibiting Defendant Media Temple or other third
15 parties contacted by and working in concert with Facebook from suspending or altering the Site
16 or any related domains.

19 **II. ARGUMENT**

20 **a. TRO Standard**

21 The Court may issue a temporary restraining order without written or oral notice to the
22 adverse party or its attorney if specific facts in an affidavit clearly show that immediate and
23 irreparable injury, loss, or damage will result to the movant before the adverse party can be heard
24 in opposition, and the movant's attorney certifies in writing any efforts made to give notice and
25 the reasons why it should not be required. Fed. R. Civ. P. 65(b). As set forth in the Declaration
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of David S. Godkin, movant's attorney has certified in writing that notice has been provided to Facebook's counsel and to Media Temple.

b. Plaintiff and the Public will Suffer Immediate, Irreparable Injury Absent a TRO

1. Facebook Is Attempting to Chill Free Speech Protected Under the First Amendment of the United States Constitution and California's anti-SLAPP Statute

Upon information and belief, Facebook sent its Notice of Trademark Infringement to 643 with full knowledge of the intended purpose of the Site, a purpose that is evidently both non-commercial in nature and of great importance to the economy and legal community. Facebook knew of this intended purpose because 643 communicated it to Facebook in advance of and during a court-mandated mediation on 8 November 2016. See First Amended Complaint, ¶3. As such, Facebook's Notice was designed to create a chilling effect intended to suppress 643's free speech and activities in furtherance of a matter of great importance to the public. The First Amendment to the Constitution of the United States and California's Anti-SLAPP law (Cal. Civ. Proc. Code § 425.16) prohibit conduct intended to create this kind of "chilling effect" around issues of great public importance, particularly when the activities are in connection with a judicial proceeding and an overt campaign to raise awareness among lawmakers and regulators of a great injury to small software businesses founded and operating in the United States. In an effort to prevent 643 from raising awareness of this issue, Facebook has lashed out and accused 643 of trademark infringement and dilution. Plaintiff must be permitted to raise awareness of this critical issue that ensures this relatively new and innovative application economy is subjected to the same rule of law as every other industry on the planet.

Courts and legislatures have made clear that it is not appropriate to use trademark infringement and trademark dilution protection for the purpose of intimidation tactics designed to

1 prevent discussion of issues of great public importance. "The First Amendment may offer little
 2 protection for a competitor who labels its commercial good with a confusingly similar mark, but
 3 trademark rights do not entitle the owner to quash an unauthorized use of the mark by another
 4 who is communicating ideas or expressing points of view." See Mattel Inc. v. MCA Records,
 5 Inc., 296 F.3d 894, 900 (9th Cir. 2002).

6 In 1993, the California legislature enacted the Anti-Strategic Lawsuit Against Public
 7 Participation ("anti-SLAPP") statute. Cal.Civ.Proc.Code § 425.16(a). The anti-SLAPP statute is
 8 "designed to allow courts 'to promptly expose and dismiss meritless and harassing claims
 9 seeking to chill protected expression.'" Mindys Cosmetics, Inc. v. Dakar, 611 F.3d 590, 595 (9th
 10 Cir. 2010) (quoting Bosley, 403 F.3d 672, 682). "The hallmark of a SLAPP suit is that it lacks
 11 merit, and is brought with the goals of obtaining an economic advantage over a citizen party by
 12 increasing the cost of litigation to the point that the citizen party's case will be weakened or
 13 abandoned, and of deterring future litigation." United States ex rel. Newsham v. Lockheed
 14 Missiles & Space Co., 190 F.3d 963, 970-971 (9th Cir. 1999) (citing Wilcox v. Superior Court,
 15 27 Cal.App.4th 809, 814-817, 33 Cal.Rptr.2d 446, 449-50 (1994)). Here, 643 has made an initial
 16 prima facie showing that its First Amended Complaint "arises from an act in furtherance of [its]
 17 right of petition or free speech." Braun v. Chronicle Publ'g Co., 52 Cal.App.4th 1036, 1042-43,
 18 61 Cal.Rptr.2d 58, 61 (1997). Further, 643 need not show that Facebook's actions were intended
 19 to chill defendant's speech. Facebook's "intentions are ultimately beside the point". See Equilon
 20 Enters., LLC v. Consumer Cause, Inc., 29 Cal.4th 53, 67, 124 Cal.Rptr.2d 507, 519, 52 P.3d 685,
 21 694 (2002). Given that the anti-SLAPP statute was designed precisely to prevent the kind of
 22 conduct in which Facebook is now engaged, Plaintiff is highly likely to succeed on the merits of
 23 its First Amended Complaint.
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c. **Plaintiff Will Suffer Irreparable Injury if the Site is Taken Down**

Plaintiff has invested substantial resources of time and money in developing the Site and the related content, including custom-made documentary videos totaling over 35 minutes. See Kramer Declaration, ¶14. The purpose of this investment of time and money is for Plaintiff to raise awareness of the harm caused by a lack of regulation in application economies, to identify other businesses who have suffered such harm, and to generate a movement to fight against this injustice that has caused a massive transfer of wealth to Facebook from small businesses and the families they support. See Kramer Declaration, ¶¶12, 14. If the Site were to be shut down even for any period of time, Plaintiff's substantial investment would be irreparably harmed as various stakeholders who have taken interest in Plaintiff's efforts are currently reviewing and sharing the Site with their advisors and stakeholders. See Kramer Declaration, ¶14. Further, the public and thousands of small businesses who have been impacted by Facebook's tactics would be irreparably harmed by these intimidation tactics designed to prohibit their free expression and advocacy for fairness and competition in software application ecosystems. See Kramer Declaration, ¶¶7, 8, 12, 14.

d. **Plaintiff Is Likely To Succeed On the Merits of its Declaratory Judgment Claims**

643 is likely to succeed on its claims for declaratory relief because Facebook is not likely to prove trademark infringement as it has threatened. "The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers." Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189 (1985). Accordingly, the Act provides for civil liability against "[a]ny person who, on or in connection with goods or services...uses in commerce any word, term, name, symbol, or device, or any combination thereof...., which (A) is

likely to cause confusion...as to the origin, sponsorship, or approval” of the goods or services. 15
U.S.C. § 1125(a)(1). 2

Here, the parties dispute whether the use of the Facebook trademark is “likely to cause 3
confusion” as to Facebook’s products and services’ “origin, sponsorship, or approval”. “The test 4
for likelihood of confusion is whether a ‘reasonably prudent consumer’ in the marketplace is 5
likely to be confused as to the origin of the good or service bearing one of the marks.” 6
Entrepreneur Media, Inc. v. Smith, 279 F.3d 1135, 1140 (9th Cir. 2002) (quoting 7
Dreamworks Production Group, Inc. v. SKG Studio, 142 F.3d 1127, 1129 (9th Cir. 1998)). 8
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In AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979), the Ninth Circuit 10
developed an eight-factor test to guide determinations about likelihood of confusion. 11

Entrepreneur Media, 279 F.3d at 1140. The Sleekcraft factors are: 12

1. The strength of the trademark; 13
2. The similarity of the marks; 14
3. The proximity or relatedness of the goods or services; 15
4. Intent in selecting the marks; 16
5. Evidence of actual confusion; 17
6. The marketing channels used; 18
7. The likelihood of expansion of product lines; and, 19
8. The degree of care consumers are likely to exercise. 20

Entrepreneur Media, 279 F.3d at 1140 (citing Sleekcraft, 599 F.2d at 348-49). In the application 21
of the Sleekcraft test to Facebook’s threatened trademark infringement claims, the Court should 22
not “decide whether confusion is likely by considering mechanically the number of Sleekcraft 23
factors that weigh in favor of either party, or by giving the same weight to a particular factor 24
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1 from case to case.” Entrepreneur Media, 279 F.3d at 1141 (citing Brookfield Communications,
2 Inc. v. West Coast Entertainment Corp., 174 F.3d at 1054)). Instead, the Court should “consider
3 what each fact, and – more importantly – what the analysis as a whole reveals about the ultimate
4 question before us.” Id. Further, in Bosley Medical Institute, Inc. v. Kremer, 403 F.3d 672 (9th
5 Cir. 2005), the court held that a gripe site that hosted no advertising, did not directly link to any
6 commercial websites, and was devoted to critical commentary was not a “use in connection with
7 a good or service”. See Bosley, 403 F.3d 672, 677.

8
9 The Site is obviously a gripe site that has no commercial purpose whatsoever. The Site
10 does not sell advertising, it does not link to a commercial website, and it does not sell a
11 commercial product or service. See Kramer Declaration, ¶9. There is no mechanism on the site
12 or any offering in which money could exchange hands at all. See Kramer Declaration, ¶11. The
13 owner of the Site has made no attempts to transfer, sell or profit in any way from the domain or
14 the Site. See Kramer Declaration, ¶15. The URL of the site is clearly distinguishable from the
15 Facebook.com URL, as the Facebook.com URL is eight characters long while the
16 FacebooksAppEconomy.com URL is 19 characters long. It is not possible for a consumer to type
17 in those 11 additional characters into the URL and think they were still going to the
18 Facebook.com website. Further, Facebook does not have any product, good, trademark or other
19 intellectual property in the term “App Economy”. The use of “App Economy” is clearly intended
20 to distinguish the Site from any good or service offered by Facebook and it is obvious simply
21 from the URL that the Site intends to serve as a public forum for the application economy
22 managed by Facebook. Further, upon entering the site, the first words that appear at the top of
23 the page include phrases like “Our Demands,” “Join Litigation,” “Litigation Timeline,” and
24 “Join Our Effort to Protect All Facebook Developers”. Finally, at the very top of the site, the
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1 classic Facebook thumbs up trademark is turned upside down to reflect a thumbs down, clearly
2 demonstrating a gripe with Facebook and any identical use of the Facebook mark. It is hard to
3 imagine how someone could view the thumbs down icon and somehow still confuse the Site with
4 any Facebook-owned property.

5 It is clear even from a brief glance at the Site that the Sleekcraft factors clearly
6 demonstrate that the Site is unlikely to cause any confusion among Facebook's consumers. The
7 marks are not similar as the primary Facebook thumbs up icon is turned upside down, indicating
8 a gripe with Facebook. There are no goods or services being sold that could be confused with
9 those offered by Facebook. The intent in selecting the marks is clearly to demonstrate a gripe
10 with Facebook regarding an issue of great importance to the global economy, the legal system
11 and the rights of consumers and small businesses to be protected from predatory practices that
12 violate California law. There are two separate videos describing these predatory practices
13 totaling over 35 minutes combined, making it clear that the Site is intending to serve as a
14 discussion forum around a \$227 billion economy that is currently not regulated by law. There are
15 no marketing channels being used to sell a product, there is no product in which to consider an
16 expansion of product lines, and finally, even a consumer acting recklessly would be highly
17 unlikely to confuse the Site with any Facebook property.

18 Similarly, in the trademark dilution context, noncommercial speech is not actionable as
19 dilution by blurring or dilution by tarnishment under 15 U.S.C. §1125(c). See 15 U.S.C. §
20 1125(c)(3)(C). Congress created this defense precisely to ensure that dilution claims would not
21 impinge upon First Amendment rights, particularly around issues of great public importance that
22 affect thousands of businesses and families who have been victims of unfair and deceptive
23 business practices. See Avery Dennison Corp. v. Sumpton, 189 F.3d 868, 873 (9th Cir. 1999)
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(the Act is designed to protect consumers who have formed particular association with a mark from buying a competing product); Mattel Inc. v. MCA Records, Inc., 296 F.3d 894, 903 (9th Cir. 2002) ("Although this statutory language is ungainly, its meaning seems clear: It refers to a use of a famous and distinctive mark to sell goods other than those produced or authorized by the mark's owner."); and Huthwaite, Inc. v. Sunrise Assisted Living, Inc., 261 F.Supp.2d 502, 517 (E.D.Va. 2003) (holding that the commercial use requirement of the FTDA is "virtually synonymous with the 'in connection with the sale, offering for sale, distribution, or advertising of goods and services' requirement" of the Lanham Act). As the Second Circuit held, "[t]he Lanham Act seeks to prevent consumer confusion that enables a seller to pass off his goods as the goods of another.... [T]rademark infringement protects only against mistaken *purchasing decisions* and not against confusion generally." Lang v. Ret. Living Publ'g Co., Inc., 949 F.2d 576, 582-83 (2d Cir.1991).

The courts have interpreted this defense broadly, showing that "noncommercial" speech applies to any speech that does more than propose a commercial transaction. See Mattel 296 F.3d 894, 905-907 (non-commercial use exception to dilution extends to all non-commercial speech, even in products that are offered for sale); and Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 552-553 (5th Cir. 2001) (protects the right of expression so long as the primary motive of the speaker is to express criticism, not to sell more products). Here, there is no commercial transaction to be contemplated in the first place. See, e.g. TMI, Inc. v. Maxwell, 368 F.3d 433, 435, 438 (5th Cir. 2004) (holding that the commercial use requirement is not satisfied where the site has no outside links); Bosley, 403 F.3d 672, 678 (identification of lawyers and provision of a link to same did not transform a noncommercial site into a commercial one). Further, the federal dilution statute creates a categorical exemption for "criticizing...or commenting upon the famous

1 mark owner or the goods or services of the famous mark owner.” See 15 U.S.C. §
 2 1125(c)(3)(A)(ii). See also Bosley, 403 F.3d 672, 679 (the “use of the...mark is not in
 3 connection with a sale of goods or services – it is in connection with the expression of [an]
 4 opinion *about*...goods and services. The dangers that the Lanham Act was designed to address
 5 are simply not at issue in this case”). Given that the Site is entirely noncommercial in nature,
 6 Plaintiff is highly likely to prevail on the merits of its First Amended Complaint.

7
 8 **e. The Existence of Serious Questions Going to the Merits Tips the
 Balance in Support of Granting Plaintiff’s Motion**

9 This is a textbook gripe site case. A thorough understanding of Plaintiff’s legitimate gripe
 10 with Facebook, a gripe that has passed demurrer on four causes of action in California Superior
 11 Court, can be obtained simply by watching the documentary video at
 12 FacebooksAppEconomy.com/fullstory. That a California Superior Court has permitted Plaintiff
 13 to proceed on four causes of action is evidence in support of the legitimate nature of the gripe.
 14 The URL and Site have absolutely no commercial purpose, are clearly designed to avoid
 15 confusion, and support Plaintiff’s efforts in ongoing litigation. There can be no doubt that the
 16 balance of hardships tips in favor of granting Plaintiff’s preliminary injunction. If Plaintiff is not
 17 permitted to continue its advocacy in support of a fair and just application economy, then
 18 countless businesses and families will be impacted by a continued pattern of anti-competitive
 19 behavior that violates California and United States Law.
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22 It is estimated that Facebook’s application ecosystem produced \$227 billion of economic
 23 activity and supported 4.5 million jobs in 2014 alone.² This application ecosystem currently
 24 operates in the absence of regulation. Facebook sets the rules of the game and is also one of its
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 27 ² See: “New Deloitte Report Looks at Facebook’s Impact on Global Economy, Jobs,” 20 January 2015, at
 http://newsroom.fb.com/news/2015/01/new-deloitte-report-looks-at-facebooks-impact-on-global-economy-jobs/.

1 largest players. Facebook has taken advantage of this fact to effectuate large transfers of wealth
2 from small businesses and consumers to itself by engaging in a series of “bait and switch” tactics
3 that violate Section 5 of the Federal Trade Commission Act (FTCA) and California’s Unfair
4 Competition Law (UCL). Application ecosystems, or App Economies, are new and innovative
5 industries critical to the global economy as a whole.

6 The rule of law has yet to catch up to these innovative economies, but many in the legal
7 community have begun to take notice of the immense harm caused by a failure to regulate. As
8 recently as 19 October 2016, Representative Henry C. “Hank” Johnson, the Ranking Member of
9 the Antitrust Subcommittee of the House Judiciary Committee, called on the FTC to investigate
10 anti-competitive behavior in App Economies. Johnson wrote: “It is critical that we promote and
11 defend competition, even in markets that are highly innovative, to ensure that small entrants
12 aren’t squeezed out through needlessly restrictive conditions and policies.... I strongly encourage
13 the FTC to give this issue the close attention that it deserves.”³ The Site serves a critical function
14 in exposing how App Economies are manipulated in the absence of regulation. In doing so, the
15 Site also identifies what we can do as a public and legal community to promote fairness and
16 competition in these economies in order to ensure their long-term stability and protect businesses
17 and consumers.

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26 ³ See: “Johnson Leads Bipartisan Call for Investigation of Anticompetitive Practices in the App Marketplace,” 19
27 October 2016, at <https://hankjohnson.house.gov/media-center/press-releases/johnson-leads-bipartisan-call-investigation-anticompetitive-practices>.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that its motion be granted, and that the Court enter the proposed Temporary Restraining Order submitted herewith.

DATED: December 22, 2016

CRITERION LAW

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